

- (1) Whether claimant's injury arose out of and in the course of her employment.
- (2) Whether the Administrative Law Judge exceeded her jurisdiction in awarding temporary total benefits.

(3) Whether the Administrative Law Judge exceeded her jurisdiction in not ordering an independent medical examination under K.S.A. 44-516.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds claimant's condition did arise out of and in the course of her employment with regard to the right pseudoaneurysm.

Claimant, a home care specialist with C & L Companions, suffered an injury to her groin between October 11, 1993 and October 25, 1993, while assisting a patient who was a partial invalid. The claimant felt immediate pain in her groin while helping lift the patient and advised her employer on October 25, 1993 of this incident. She was referred to Dr. James Smith, an internal vascular specialist with the Galichia Medical Group who referred her to Dr. Douglas Milfeld for surgical repair of the right femoral artery.

This matter becomes unusually complicated due to the pre-existing nature of the claimant's condition. Dr. Milfeld had performed surgery on claimant's femoral artery prior to the date of the injury and had expressed concern regarding the sutures used to repair the surgical site. Respondent contends the problems associated with the sutures led to claimant's current problem.

Claimant was initially referred to Dr. James A. M. Smith, an interventional vascular internist with the Galichia Medical Group in Wichita, Kansas. Dr. Smith, in his letter of January 17, 1994, states emphatically that claimant's injury did result from the excessive straining required during her work with the respondent. This opinion is contradicted by Max T. Taylor, M.D., a general thoracic and vascular surgeon from Phoenix, Arizona, hired by the respondent to review the medical reports of the claimant. Dr. Taylor states that the claimant's false aneurysm was not related to the over exertion in lifting patients and that this false aneurysm would have occurred secondary to her pre-existing vascular disease regardless of her work activities.

Unfortunately for all concerned, Dr. Milfeld, the treating and operating surgeon in this matter, expressed no opinion regarding the causational factors related to claimant's injury. The Administrative Law Judge, in deciding in claimant's favor, found claimant had met her burden of proof with respect to the injury to her right femoral artery. The burden of proof in a workers compensation matter requires a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. See K.S.A. 44-508(g). This burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In dealing with conflicting medical reports it is neither uncommon nor unacceptable for the trier of fact to give more credence to a medical provider who has had the opportunity to examine and treat the claimant over the opinion of a medical examiner who has had only the opportunity to review medical reports with no opportunity to become familiar with the claimant and her ongoing physical problems. The Administrative Law Judge's finding that claimant had met her burden of proof with respect to the right femoral artery is affirmed.

(2) K.S.A. 44-551 grants the Appeals Board jurisdiction to review all acts, findings, awards, decisions, rulings or modifications of findings or awards made by Administrative Law Judges. K.S.A. 44-551 goes on to say that appeals of preliminary hearing orders under K.S.A. 44-534a shall not be conducted unless it is alleged that the Administrative Law Judge exceeded the Administrative Law Judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. K.S.A. 44-534a(a)(2) lists appealable disputed issues including whether the claimant suffered an accidental injury, whether the accidental injury arose out of and in the course of employee's employment, whether notice is given or claim timely made, or whether certain defenses apply. These issues are jurisdictional and subject to review by the Appeals Board.

K.S.A. 44-534a grants the Administrative Law Judge the authority to decide issues dealing with furnishing of medical treatment and the payment of temporary total disability compensation.

As the Appeals Board has found claimant's injury did arise out of and in the course of her employment with the respondent, the Administrative Law Judge's decision regarding the awarding of temporary total benefits will not be disturbed as it is not an issue reviewable by the Appeals Board under K.S.A. 44-534a.

(3) K.S.A. 44-516 grants the Director discretion to employ one or more neutral health care providers, not exceeding three in number, to make such examinations of an injured employee as the Director may direct. There is no mandate under K.S.A. 44-516 that the independent medical examination powers of the Director under this statute must be used in any specific situation. This being a discretionary act on the part of the Director, an Administrative Law Judge's decision to not so order an independent medical examination would be well within the powers of the Administrative Law Judge and this finding would not be appealable from a preliminary hearing as the Administrative Law Judge did not exceed her jurisdiction under K.S.A. 44-551.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl, dated June 14, 1994, is affirmed and remains in full force and effect. The Order of the Administrative Law Judge, being brief, is more fully explained in the transcript of the Preliminary Hearing dated June 14, 1994, page 28, line 6 through page 29, line 23.

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Shannon S. Krysl, Administrative Law Judge
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